POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SPOKANE ROCK PRODUCTS, INC., LARRY J. REES AND JEANNE A. REES, Appellants, v. SPOKANE COUNTY AIR POLLUTION CONTROL AUTHORITY, INLAND ASPHALT COMPANY Respondents.	PCHB NO.05-127 **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DENYING PETITION FOR RECONSIDERATION**

BACKGROUND

This case is an appeal of decisions by the Spokane County Air Pollution Control Authority (SCAPCA) related to Inland Asphalt Company's (Inland Asphalt) facility in Spokane, Washington. This matter comes before the Board on two motions. First, the Appellants, Larry J. and Jeanne A. Rees seek reconsideration of the Board's January 6, 2006 Summary Judgment Order. Second, consistent with the Board's January 6, 2006 Order, the Respondents have filed supplemental memorandum in support of Motions for Summary Judgment on the question of whether the Appellants, Larry J. and Jeanne A. Rees have standing under SEPA. Peter G. Scott of Preston Gates & Ellis represented the Reeses. Michelle Wolkey of Wolkey McKinley represented SCAPCA. Timothy Lawler and Stanley Schwartz of Witherspoon, Kelley,

Davenport & Toole represented Inland Asphalt. Board member Kathleen Mix presided, joined by member William H. Lynch.[1] The motion was based solely on the written record, which consisted of the following:

1. SCAPCA's Memorandum in Support of Summary Judgment;
2. Inland Asphalt's Memorandum in Support Re Dismissal of Appellants' SEPA Claims for Failure to Exhaust Administrative Remedies and Waiver;
3. Rees' Response to Inland and SCAPCA'S Second Motion for Summary Judgment (with Appendices);
4. Declaration of Peter G. Scott in Support of Rees' Response to Second Motion for Summary Judgment (including Exhibits 1-14);
5. Declaration of Jeanne A. Rees (including Exhibits 1-3);
6. SCAPCA's Reply Memorandum in Support of Its Supplemental Motion For Summary Judgment on Standing; and
7. Inland Asphalt's Reply in Support of Motion to Dismiss Appellant's SEPA Claims For Failure to Exhaust Administrative Remedies and Waiver.

LEGAL ISSUE

The issue before the Board in this motion is whether the Appellants, Larry J. and Jeanne A. Rees are precluded from pursuing SEPA issues in this appeal due to lack of timely comment or participation in the environmental analysis conducted by the lead agency, SCAPCA. The supplemental briefing filed by the parties on this issue fully addresses Legal Issue 3 from the Pre-Hearing Order, which was as follows:

> 3. Whether appellants have standing to pursue this matter, including whether Appellants failed to timely comment during the SEPA process?

[1] The third position on the Board is currently vacant.

FACTS

For ease of reference, the chronology of events relevant to this motion is as follows:

June 21, 2005:

> SCAPCA withdraws a 1999 Determination of Nonsignificance ("DNS") for the proposed temporary asphalt plant, and issues a Determination of Significance ("DS") and Request for Comments on Scope of EIS. The DS identified "compliance with applicable zoning requirements" as the area for discussion in the EIS, and had a comment period ending July 12, 2005. The Reeses did not submit a comment to SCAPCA on the DS.

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July 14, 2005:

> SCAPCA issues an MDNS for Inland Asphalt's proposed plant. The mitigation measures section of the MDNS refers to a July 11, 2005 letter from Spokane County. This letter from Spokane County concludes that a Change of Conditions or Temporary Use Permit from Spokane County would be required before Inland Asphalt's plant could operate. The Reeses did not submit a comment to SCAPCA on this MDNS.

July 14, 2005:

> Spokane County issues a letter to SCAPCA superseding the letter of July 11, 2005 which concluded that a Change of Conditions or Temporary Use Permit would be required. The July 14 letter concludes that "zoning regulations currently applicable to the property do not preclude the use of the subject site for a temporary asphalt plant."

July 18, 2005:

Spokane County submits a comment letter to SCAPCA's July 14, 2005 MDNS reiterating that its July 14, 2005 letter superseded its July 11, 2005 letter regarding the zoning for the site.

July 27, 2005:

SCAPCA issues a draft Notice of Construction and Order of Approval to Inland Asphalt for review and comment. The draft Order of Approval is provided to other interested parties for informational purposes.

July 29, 2005:

The public comment period for the July 14, 2005 MDNS ends.

August 4, 2005:

SCAPCA issues a final MDNS. The mitigation measures section of the final MDNS differs from the July 14, 2005 MDNS in that it references Spokane County's July 14 and 18 letters, not the July 11, 2005 letter. There was no public comment period for this final MDNS.

August 11, 2005:

SCAPCA issues the Notice of Construction and Order of Approval.

August 17, 2005:

Reeses write a comment letter to Joe Southwell of SCAPCA, which is submitted to SCAPCA at an August 18, 2005 SCAPCA Board meeting.

:

ANALYSIS

[1]

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 Wn.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), review denied, 117 Wn.2d 1004 (1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts and reasonable inferences must be construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment may also be granted to the non-moving party when the facts are not in dispute. *Impecoven v. Department of Revenue*, 120 Wn.2d 357,365, 842 P.2d 470 (1992).

In this case there are not material facts in dispute. Therefore, summary judgment is appropriate.

[2]

The Board has previously concluded in its January 6, 2006 Order that the August 4, 2005 MDNS was a final MDNS, and as such was not subject to an additional public comment period under SEPA or SEPA rules. SEPA Handbook 2.8.4: See also *CUSS et.al.v. Swecker et. al.,* SHB No. 88-38 (1989). The only comment submitted by Appellants was submitted to SCAPCA on August 18, 2005, past the time that SCAPCA was required under SEPA to have public comment and past the previous comment periods that had been made available to agencies and the public.

[3]

WAC 197-11-545 concerns the effect of not submitting comments to the lead agency during the SEPA comment process:

> (1) **Consulted agencies**. If a consulted agency does not respond with written comments within the time periods for commenting on environmental documents, the lead agency may assume that the consulted agency has no information relating to the potential impact of the proposal as it relates to the consulted agency's jurisdiction or special expertise. Any consulted agency that fails to submit substantive information to the lead agency in response to a draft EIS *is thereafter barred from alleging any de*fects in the lead agency's compliance with Part Four of these rules.
>
> (2) **Other agencies and the public**. Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, *shall be construed as lack of objection* to the environmental analysis, if the requirements of WAC 197-11-510 are met.
>
> (italics added)

In its January 6, 2006 Order, the Board began analysis of WAC 197-11-545, with the following points:

1. Although this section of the SEPA rules relates to comments in response to a draft EIS, its principles also apply where an MDNS, rather than an EIS, is issued because WAC 197-11-545(2) relates to "environmental documents," which would include both EISs or MDNSs and because it uses the phrase "lack of objection to the environmental analysis," which in many cases would be through an MDNS, not an EIS.

2. This section of the SEPA rules has previously been interpreted to bar a consulted agency from raising issues in a SEPA appeal that were not raised in the comment period. *Kitsap County v. DNR*, 99 Wn.2d 386, 391-92 (1983). The Shorelines Hearings Board recently relied on this decision to also conclude that a consulted agency was barred from raising an objection to an EIS for the first time on appeal. *DNR and WDFW v. Kitsap County*, SHB 03-018 (2004).

3. Subsection (1) of WAC 197-11-545(1) applies to consulted agencies, and uses the phrase "is thereafter barred from alleging any defects" in describing the consequence of a failure to comment on an environmental document. In contrast, WAC 197-11-545(2), which applies to other agencies and members of the public, uses the phrase "shall be construed as lack of objection" to define the consequence of failure to comment. This difference between WAC 197-11-545(1) and (2) has led Professor Richard Settle to conclude:

> [The SEPA rules go] beyond consulted agencies to provide that lack of timely comment by other agencies or members of the public 'shall be construed as lack of objection to the environmental analysis.' Since this provision does not purport to absolutely bar legal challenge for nonparticipation in the DEIS commenting process, apparently common law principles of waiver and exhaustion of administrative remedies would govern.
>
> Richard L. Settle, The Washington State Environmental Policy Act, A Legal and Policy Analysis, § 14.01 [10], pages 14-76/77 (12/03 ed.). (Settle footnotes omitted).

Based on this analysis the Board allowed the parties to submit additional briefing on the question of whether the Reeses had failed to failed to exhaust administrative remedies or waived their rights such that they were precluded from pursuing SEPA claims in this appeal.

[4]

One of the SEPA's purposes is to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences. *King County v. Boundary Review Board*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993); *Kitsap County*, 99 Wn.2d at 391. In *Kitsap County*, the Court noted that where objection to an environmental impact statement is saved until the parties receive an unfavorable decision, the purposes of SEPA are frustrated. *Id.* In the Board's judgment, these are bedrock principals in interpreting SEPA, and apply equally to consulted agencies, other agencies or the public.

[5]

Participation and objection to the environmental analysis is generally regarded as a prerequisite to review of agency decisions. *Citizens v. Mount Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997); *Advocates for Responsible Development and John Diehl v. Johannessen and Mason County*, SHB NO. 05-014. In *Johannessen*, the Board held that a party must exhaust local administrative remedies pertaining to the procedural protections of SEPA prior to bringing a procedural SEPA claim to the Board (although substantive SEPA could be raised because there was no local appeal of substantive SEPA matters). *Johannessen* addressed the failure of the party to take an appeal under County Code before coming to the Shoreline Hearings Board, but did not address the exhaustion requirements of WAC 197-11-545(2).

[6]

The Board concludes that the language of WAC 197-11-545(2) requires "other agencies and the public" to exhaust administrative remedies before a party will have standing to seek further review of SEPA decisions before this Board. This is consistent with well-established Washington law that a party must generally exhaust all available remedies prior to seeking judicial relief. *Citizens v. Mt. Vernon*, 133 Wn.2d at 866. Such an interpretation is also consistent with long-standing interpretations of SEPA that encourage consideration of environmental factors as early as possible so decision makers will have all relevant information in front of them. *Kitsap County*, 99 Wn.2d at 391; *King County v. Boundary Review Board*, 122 Wn.2d at 663.

[7]

Participation in public hearings, or commenting through the environmental review process are in some circumstances the only administrative remedy available to a party and thus are the forums in which exhaustion of remedies must occur in order for the party to later make a claim. See, *Citizens v. Mount Vernon*, 133 Wn.2d at 869.[2] The very language of WAC 197-11-545(2) that "lack of comment" shall be construed as "lack of objection" to the environmental analysis assumes that a comment period is part of an available administrative process that should be utilized by interested members of the public.

[8]

In this case, it is undisputed that the Reeses did not make any comment during the environmental review process until after the final MDNS had been issued by SCAPCA. They submitted no comments during the June 21 through July 12, 2005 comment period (on issuance of the Determination of Significance). They submitted no comments during the comment period available after the July 14 issuance of the MDNS. Both the DS and MDNS identified zoning as an issue relevant to the environmental considerations at the site. Despite these two comment periods in which to raise issues about the environmental consequences of the plant in their neighborhood, the Reeses filed comments only after a permit was issued by the lead agency. A

[2] SCAPCA advances the argument that the Reeses also failed to exhaust their remedy of an appeal of the final MDNS or NOC to the SCAPCA Board, pursuant to a 1984 Spokane Environmental Ordinance, 11-10-170©. The Reeses respond that the ordinance was not adopted, and that the underlying action must be appealed to this Board in any event. SCAPCA asks the Board to interpret a somewhat confusing Ordinance in a manner that would require an appeal of the NOC to the SCAPCA Board, a further avenue the Reeses should have pursued in order to exhaust remedies. The Board does not address this issue as it concludes the Reeses failed to exhaust other remedies and waived their SEPA rights due to lack of comment or participation in the SEPA review.

citizen petition signed by the Reeses was also presented to the county in mid-September, after the close of the comment period. *Declarations of Michelle K. Wolkey and Joe Southwell in Support of SCAPCA'S Response to Reeses Cross Motion For Summary Judgment; Declaration of Timothy M. Lawlor in Support of Motion to Dismiss SEPA Claims of Larry and Jeanne Rees; Declaration of Jeanne A. Rees.*

By saving their objections until the unfavorable action by SCAPCA, the issuance of the Notice of Construction, the Reeses did not give the lead agency the benefit of their concerns over noise, odors, emissions, or raise other issues. This deprived the decision maker, SCAPCA, of any opportunity to review potential environmental concerns of the citizens or consider environmental consequences of the project before it was underway.

[9]

The Reeses assert that they did not need to comment through the SEPA process because they expected to be able to give public input through other avenues that were acceptable to them, specifically a zoning proceeding before Spokane County. Given the July 11, 2005 letter from Spokane County that initially concluded that a Change of Conditions or Temporary Use Permit would be required, they claim they expected to be able to raise issues in that proceeding. While comments to the County may have been relevant to the Spokane County zoning decision, it was not the forum in which SCAPCA, the lead agency for SEPA purposes, would hear environmental concerns about the project in a manner that would allow it to require further mitigation or condition the permit. SEPA requires comment to the lead agency during the SEPA review

process, not in other proceedings of the interested parties choosing. See, WAC 197-11-500 *et. seq*.(Commenting).

[10]

Although Spokane County changed its decision on the applicable zoning for the site during the MDNS review and comment process, this does not affect the obligation of the Reeses to raise concerns over noise, odors, or emissions to SCAPCA during the available comment periods on the MDNS. Separate and apart from the SEPA review, they also could have taken concerns over the zoning action directly to Spokane County, but again, failed to do so.

[11]

The Reeses are precluded from raising SEPA issues in this case due to their lack of participation and comment in the SEPA review process. Their lack of comment is a failure to exhaust available administrative remedies and must be construed as a lack of objection to the environmental analysis. As a result, they lack standing to pursue SEPA claims in this appeal.

[12]

The Reeses seek reconsideration of the Board's January 6, 2006 Order which granted partial summary judgment to SCAPCA and Inland Asphalt. They argue that the Board did not rule directly on the issue of whether SCAPCA complied with SEPA when it issued the NOC #1290, and assert that SCAPCA failed to wait fourteen days after issuance of the August 4 MDNS as required by SEPA. They also ask the board to reconsider that portion of the decision that concludes that SEPA required no comment period after the issuance of the final MDNS.

Consistent with the analysis of this Order, the Reeses are precluded from raising these SEPA compliance issues. Even if there were a violation of the time frame at this point in the permitting process, the Board would be reluctant to undo the agency action for a procedural violation that would be considered harmless error or not prejudicial. See, *Moss v. City of Bellingham*, 109 Wn.App. 6, 25, 31 P.3d 703 (2001). Accordingly, the Petition for Reconsideration, with request for oral argument, is denied.

Based on the foregoing analysis, the Board enters the following

ORDER

1. The Motion for Summary Judgment by Respondent SCAPCA and Motion to Dismiss by Respondent Inland Asphalt on the question of whether the Appellants Reeses have standing is **GRANTED.**
2. Legal Issue No 3 in the Pre-Hearing Order is **DISMISSED** from the appeal, based on the Board's conclusion that the Reeses lack standing to raise SEPA claims in this appeal
3. The remaining sub-issues in Legal Issue No. 2 of the Pre-Hearing Order are **DISMISSED**, as each raises SEPA issues and the Rees are precluded from raising the same.
4. Because the Reeses are precluded from raising SEPA issues, the petition for reconsideration is **DENIED**, as it raises purely SEPA issues.

5. **The following issue from the Pre-Hearing Order (Issue No. 1) remains for hearing**:

a. "Whether notice of construction approval (NOC) 1290 issued by SCAPCA to Inland Asphalt Company complies with applicable regulation, including whether it requires best available control technology (BACT)?"

SO ORDERED this 13th day of February, 2006.

POLLUTION CONTROL HEARINGS BOARD

KATHLEEN D. MIX, PRESIDING MEMBER

WILLIAM H. LYNCH, CHAIR